



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 6521-97

18 November 1999

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) Case Summary  
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the United States Marine Corps filed an application with this Board requesting, in effect, that the reason for his discharge and the reenlistment code be changed. He further requests that he be paid full separation pay.

2. The Board, consisting of Mr. Milner, Ms. Humberd, and Ms. Taylor, reviewed Petitioner's allegations of error and injustice on 9 November 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application was filed in a timely manner.

c. Petitioner reenlisted in the Marine Corps on 17 June 1993 for four years. At that time he had completed about eight years of active service on prior enlistments.

d. Petitioner then continued to serve in an outstanding manner. On 13 May 1994, the Navy Drug Laboratory reported that urinalysis had shown that he had used methamphetamines. Subsequently, a charge of drug abuse was referred to a special court-martial. On 11 October 1994, he signed a pretrial agreement agreeing to plead guilty at nonjudicial punishment (NJP) to use of methamphetamines in exchange for the court-martial charge being dropped. He also acknowledged that he could be processed for discharge under other than honorable conditions

upon completion of the NJP and agreed to waive his right to an administrative discharge board (ADB) if he was processed.

e. Petitioner received NJP on 20 October 1994 for use of methamphetamines. The punishment imposed included forfeitures of pay totaling \$1,028 and reduction in rank from SGT (E-5) to CPL (E-4). The fitness report for the period ending 20 October 1994 notes the NJP and states that based on his past performance and contributions to the Marine Corps, he was being recommended for a general discharge.

f. On 16 November 1994 Petitioner was notified of separation processing due to use of a controlled substance. Contrary to the pretrial agreement he requested that his case be heard by an ADB. The record shows that the ADB initially met on 13 January 1995. On 27 February 1995, the ADB reconvened and corrected the initial report of the ADB, which showed that he had committed misconduct, to show that he had not intentionally consumed or ingested a controlled substance and recommended his retention in the Marine Corps. The recommendation for retention was favorably endorsed by the battalion commanding officer. However, on 27 April 1995 the regimental commanding officer recommended discharge under other than honorable conditions. He noted that Petitioner plead guilty and believed that given the pretrial agreement, an ADB should not have been held. On 27 June 1995 the commanding general of the 1st Marine Division noted that Petitioner had a drug waiver to enter the Marine Corps and had requested an ADB contrary to the pretrial agreement. The commanding general concluded as follows:

It is .... my opinion that given the totality of the evidence in the case to include prior pretrial agreement, the results of the board are in error. I also find that the assertions of the (Petitioner) that he consumed methamphetamine while innocently drinking punch at a party to be incredulous. The likelihood of innocently consuming methamphetamine, not reporting it to medical or legal authorities, and immediately participating in a urinalysis screening is extremely remote. Accordingly, it is my recommendation that (he) be separated from the Marine Corps.

g. Subsequently, no action was taken for more than six months. During this period, Petitioner received a meritorious mast, was awarded a Navy Achievement Medal and, on 21 October 1995, he was promoted to SGT. On 20 February 1996, Headquarters Marine Corps (HQMC) notified Petitioner's command that he could not be discharged because the ADB found no misconduct. HQMC suggested that the command could process him for discharge by reason of best interest of the service if it so desired.

h. Subsequently, Petitioner received another Navy Achievement Medal and his reenlistment was strongly recommended. On 17 April 1997 a new commanding general of the 1st Marine Division also recommended that he be reenlisted. Subsequently, Petitioner extended his enlistment for three months to allow consideration of his reenlistment request. On 15 July 1997 HQMC denied his request for reenlistment, directed the payment of one half separation pay and the assignment of an RE-4B reenlistment code. Petitioner was honorably discharged at the expiration of his enlistment, as extended, on 16 September 1997. At that time, he was assigned an RE-4B reenlistment code. The DD Form 214 shows that he was paid separation pay of \$12,327.90. However, the DD Form 214 issued at that time was erroneous in that it stated that the reason for discharge was "misconduct (drug abuse)".

i. In his application, Petitioner states that he only signed the pretrial agreement on the advice of his attorney so that he could avoid the severe punishment he could receive if convicted by a court-martial. He now states that if he had to do it over again, he would have accepted the court-martial and attempted to prove his innocence.

j. Attached to enclosure (1) is an advisory opinion from the Military Law Division, HQMC, which recommends that the NJP not be removed from the record. It points out that Petitioner pled guilty at the NJP and never submitted an appeal. It is noted that the commanding officer can impose NJP if he believes by a preponderance of the evidence that an offense occurred, and that there is no evidence of an abuse of discretion in this case. The drafter of the advisory opinion apparently did not notice that the ADB recommendation had been changed because the opinion erroneously states that the ADB found that Petitioner committed misconduct. Concerning this matter, however, the Board is aware that there is no requirement for the commanding officer and the ADB to come to the same conclusions concerning misconduct, and the conflicting findings can remain in the record.

k. Attached to enclosure (1) is an advisory opinion from the Separation and Retirement Branch, HQMC, which agrees with the opinion of the Board's staff that the narrative reason on Petitioner's DD Form 214 is in error. A corrected DD Form 214 has been issued showing a narrative reason for discharge of "non-retention on active duty." However, the reenlistment code was not changed and remains RE-4B.

l. Attached to enclosure (1) is an advisory opinion from the Performance Evaluation Review Branch, HQMC, which concludes that the reenlistment code was correctly assigned. "The

reenlistment code was assigned based on his overall record and means that he was not recommended for reenlistment due to in-service drug involvement."

m. The Board is aware that the only reenlistment codes which could possibly apply to Petitioner's case are RE-1A, RE-3C or RE-4B. An RE-1A means an individual is recommended for reenlistment, an RE-3C is a waiveable code which is assigned when none of the other RE-3 codes fit the circumstances. As indicated, an RE-4B reenlistment code is assigned when there is a record of inservice drug abuse.

n. Regulations allow for the payment of half separation pay in cases such as this in which further service is denied at the expiration of enlistment and the individual is not fully qualified for retention.

#### CONCLUSION:

Upon review and consideration of all the evidence of record the Board concludes that Petitioner's request warrants partial favorable action. The Board considered removal of the NJP from the record because it is inextricably part of this case. The Board notes that Petitioner pled guilty, that the regimental commanding officer and the commanding general believed that the ADB was in error and no subsequent commanding officer took action to set aside the NJP. The Board further notes that Petitioner received the benefit of his bargain in the pretrial agreement in that he received NJP punishment and his agreement not to request a ADB was not enforced. The Board concludes that the commanding officer did not abuse his discretion when he imposed NJP and agrees with the recommendation contained in the advisory opinion that the NJP should remain in the record.

Given its conclusion that the NJP should remain in the record, the Board further concludes that it provided an adequate basis to support denial of his reenlistment and the decision to only pay one half separation pay.

Notwithstanding the foregoing, the Board notes that Petitioner served in an outstanding manner for almost three years after the NJP, was again promoted to SGT and was recommended for reenlistment by his entire chain of command including the Commanding General of the 1st Marine Division. Therefore, the Board believes that he has overcome his drug abuse and concludes that the reenlistment code should now be changed from RE-4 to RE-3C.

The Board further concludes that this Report of Proceedings should be filed in Petitioner's naval record so that all future

reviewers will understand the reason for the RE-3C reenlistment code.

RECOMMENDATION:

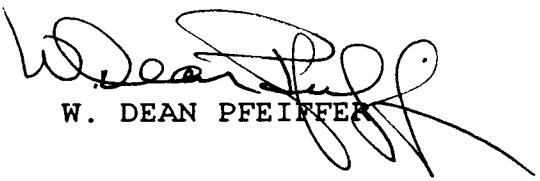
- a. That Petitioner's naval record be corrected to show that on 16 September 1997 he was assigned an RE-3C reenlistment code vice the RE-4 reenlistment code now of record.
  - b. That no further relief be granted.
  - c. That this Report of Proceedings be filed in Petitioner's naval record.
4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder



ALAN E. GOLDSMITH  
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.



W. DEAN PFEIFFER

DEC 17 1999

Reviewed and approved:



Charles L. Tompkins  
Deputy Assistant Secretary of the Navy  
(Personnel Programs)